



New York State Department of Labor
ATTN: Subminimum Wage Hearing
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Lorelei Salas
Commissioner

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June 29, 2018

Re: Eliminating the Subminimum Wage for Tipped Workers

Dear Commissioner Reardon:

The New York City Department of Consumer Affairs (“DCA”) submits these comments to the New York State Department of Labor (“NYSDOL”) in support of Governor Cuomo’s proposal to eliminate the subminimum wage for tipped workers in New York State (the “Proposal”). DCA strongly supports the effort to create one minimum wage for tipped and non-tipped workers. Eliminating the subminimum wage rate would ensure that tipped workers—those who customarily receive tips from customers or patrons—are paid the minimum wage rate applicable to almost all other workers in New York City. Additionally, the elimination of the subminimum wage would remove significant barriers to economic security for tipped workers that results from relying on the unpredictability of tips to supplement a wage.¹

DCA houses New York City’s Office of Labor Policy and Standards (“OLPS”). OLPS is charged with enforcing New York City’s workplace laws, developing innovative policies to raise job standards, and providing a central resource to help working New Yorkers assert their rights under local, state, and federal laws. In the course of its enforcement and education efforts, OLPS receives and incorporates feedback from the diverse array of workers and employers in New York City. OLPS has expertise in the issues that face workers, including tipped workers, through its enforcement of the City’s laws concerning access to paid safe and sick leave, regular and predictable work hours, and freedom from retaliation for asserting their workplace rights. Moreover, OLPS routinely encounters workers who have experienced violations of wage and hour laws or other non-payment for work performed, further illuminating our work in this space.

¹ Seven states currently require employers to pay all workers a single wage rate. Those states are California, Alaska, Minnesota, Oregon, Washington, Montana, and Nevada. SYLVIA ALLEGRETTO & DAVID COOPER, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE: WHY IT’S TIME TO GIVE TIPPED WORKERS THE REGULAR MINIMUM WAGE 9 (2014), <https://www.epi.org/files/2014/EPI-CWED-BP379.pdf>.

Currently, New York Labor Law allows employers to pay tipped workers a subminimum wage rate as long as such rate, plus tips received, equals at least the minimum wage,² which in New York City is \$12.00 or \$13.00 per hour, depending on the size of the employer.³ Tipped workers work a variety of occupations; they are restaurant servers, delivery drivers, nail salon technicians, and car washers. The restaurant industry employs the vast majority of tipped workers, but nearly 20% of tipped workers are not in the restaurant industry.⁴ The subminimum wage rate for tipped workers in the hospitality industry in New York City (which includes the restaurant industry) is \$8.00 or \$8.65 per hour.⁵ The subminimum wage rate for nearly all other tipped workers in New York City is between \$9.05 and \$11.05 per hour.⁶ Workers' tips must make up the difference between the respective subminimum wage rate and the applicable minimum wage rate of \$12.00 or \$13.00.⁷ If weekly tips do not make up the difference between the subminimum and minimum wage rates, the employer is responsible for paying the difference to ensure the worker receives at least the minimum wage rate for all hours worked.⁸

NYSDOL's Proposal redistributes the cost of labor to where it should be and where it is for all other work: from the customer to the employer. It will benefit the over 324,000 tipped workers in New York State,⁹ almost all of whom earn low-wages and work under physically taxing conditions.¹⁰ It is notable that NYSDOL's Proposal does not make tipping illegal. In the seven jurisdictions that have adopted one minimum wage for all workers, studies show that one minimum wage is good for both workers and employers.¹¹ One minimum wage makes tipped

² 12 NYCRR §§ 142-2.1, 146-1.3.

³ This wage summary does not include fast food workers, who are entitled to higher minimum wage rates under the Fast Food Wage Order and who do not receive tips. 12 NYCRR § 146-1.3(c).

⁴ RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE 3 (2018) (analyzing findings from a study comparing tipped workers' working conditions across all industries in subminimum wage and one minimum wage states), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

⁵ 12 NYCRR § 146-1.3.

⁶ 12 NYCRR §§ 142-2.1, 142-2.5.

⁷ 12 NYCRR §§ 146-1.2, 146-1.3.

⁸ 12 NYCRR § 146-1.3.

⁹ SYLVIA A. ALLEGRETTO, CENTER ON WAGE AND EMPLOYMENT DYNAMICS, SHOULD NEW YORK STATE ELIMINATE ITS SUBMINIMUM WAGE? 7 (2018), <http://irle.berkeley.edu/files/2018/04/Should-New-York-State-Eliminate-its-Subminimum-Wage.pdf>.

¹⁰ See, e.g., UNIVERSITY OF CALIFORNIA, BERKELEY, STAY HEALTHY AND SAFE WHILE GIVING MANICURES AND PEDICURES A GUIDE FOR NAIL SALON WORKERS (2010), https://www.osha.gov/dte/grant_materials/fy10/sh-20864-10/nail_salons.pdf; UNIVERSITY OF CALIFORNIA, BERKELEY, A MENU FOR PROTECTING THE HEALTH AND SAFETY OF RESTAURANT WORKERS (2011), https://www.osha.gov/dte/grant_materials/fy10/sh-20864-10/rest_worker_manual.pdf.

¹¹ RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE 1-2 (2018), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

workers—who are disproportionately women and people of color—less vulnerable to economic insecurity, pay disparities, discrimination, and exploitation. And research indicates that business does not suffer as a result. In fact, one study revealed that restaurant sales are *higher* in those jurisdictions that have one minimum wage than in jurisdictions where employers can discount tips from wages paid to workers by the employers.¹²

Subminimum wages perpetuate economic insecurity that disproportionately impacts, people of color, immigrants, and women, who are overrepresented among tipped workers

The current wage system for tipped workers perpetuates economic insecurity—the inability to meet minimum standards of living in a particular community—for many of the workers who are subjected to it.¹³ National studies indicate that tipped workers are paid lower wages overall than other workers, with a median wage of \$10.22 (including tips), compared with \$16.48 for other workers.¹⁴ More than 1 in 10 workers in predominantly tipped occupations nationwide reported that their hourly wages, *including* tips, fell below the national minimum wage of \$7.25.¹⁵ Only approximately 10% of workers in the restaurant industry—primarily those who are servers and bartenders in high-end dining establishments—earn sufficient income to meet minimum standards of living in their communities.¹⁶

A significant portion of tipped workers live in poverty and survive by accessing public assistance.¹⁷ In New York City, the poverty rate for tipped workers in the hospitality industry was 16.8%, compared to 7.8% for those in non-tipped occupations.¹⁸ Nationally, almost half of all

¹² RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE 2 (2018), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

¹³ RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE 5 (2018) (discussing tipped workers nationally), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

¹⁴ SYLVIA ALLEGRETTO & DAVID COOPER, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE: WHY IT'S TIME TO GIVE TIPPED WORKERS THE REGULAR MINIMUM WAGE 9 (2014), <https://www.epi.org/files/2014/EPI-CWED-BP379.pdf>.

¹⁵ THE WHITE HOUSE, THE IMPACT OF RAISING THE MINIMUM WAGE ON WOMEN 2 (2014) (prepared by National Economic

Council, the Council of Economic Advisers, the Domestic Policy Council, and the Department of Labor), <https://obamawhitehouse.archives.gov/sites/default/files/docs/20140325minimumwageandwomenreportfinal.pdf>.

¹⁶ See RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE 5 (2018), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf, *citing* Living Wage Calculator, <http://livingwage.mit.edu/> (last visited June 1, 2018).

¹⁷ RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE 5 (2018), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

¹⁸ APURVA MEHROTRA, COMMUNITY SERVICE SOCIETY, NEW YORK'S TIPPED WORKERS ARE OVERDUE FOR A RAISE. POLICY BRIEF: NEW YORK'S TIPPED WORKERS AND THE SUBMINIMUM WAGE 6 (2014), https://onlabor.org/wp-content/uploads/2014/10/93c8b40bfe6fe2896b_7um6bhc9q.pdf.

tipped workers and their families receive government assistance, compared to around 36% of non-tipped workers.¹⁹ Evidence indicates that tipped workers' elevated poverty rates are linked to not receiving a sustainable and consistent base wage: the poverty rate for tipped workers in the 18 states with a \$2.13 per hour subminimum wage is three percentage points higher than in the eight states with one minimum wage (14.8% versus 11.7%), while the poverty rate for non-tipped workers in these two different groups of states does not differ significantly (6.7% versus 6.2%).²⁰

One of the difficulties for tipped workers in achieving economic security is the income volatility inherent in tipped work.²¹ The amount of income a tipped worker receives varies week-to-week and depends on many factors, two of which are when and how much a worker is scheduled to work. A disproportionate number of workers in tipped occupations work part-time.²² And part-time workers report low-wages and high levels of schedule instability, which includes being sent home in the middle of a shift or lacking a set shift schedule.²³ The unpredictable nature of scheduling for tipped workers further exacerbates the unpredictability of tips.²⁴ Restaurant servers, for example, compete for evening shifts, which garner the most tips and, and may earn substantially less if scheduled for less desirable day shifts.²⁵ In the words of one restaurant server, “[y]our weekly paycheck is so small and tips are not stable. Sometimes you manage to

¹⁹ SYLVIA ALLEGRETTO & DAVID COOPER, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE: WHY IT'S TIME TO GIVE TIPPED WORKERS THE REGULAR MINIMUM WAGE 15 (2014), <https://www.epi.org/files/2014/EPI-CWED-BP379.pdf>.

²⁰ David Cooper, *Valentine's Day Is Better On The West Coast (At Least For Restaurant Servers)*, WORKING ECONOMICS BLOG, ECONOMIC POLICY INSTITUTE (Feb. 9, 2017, 1:46 p.m.), <https://www.epi.org/blog/valentines-day-is-better-on-the-west-coast-at-least-for-restaurant-servers/>.

²¹ SYLVIA ALLEGRETTO & DAVID COOPER, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE: WHY IT'S TIME TO GIVE TIPPED WORKERS THE REGULAR MINIMUM WAGE 19 (2014), <https://www.epi.org/files/2014/EPI-CWED-BP379.pdf>.

²² SYLVIA ALLEGRETTO & DAVID COOPER, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE: WHY IT'S TIME TO GIVE TIPPED WORKERS THE REGULAR MINIMUM WAGE 10 (2014), <https://www.epi.org/files/2014/EPI-CWED-BP379.pdf>.

²³ VIRGINIA ANDERSON ET AL., ROBERT M. LA FOLLETTE SCHOOL OF PUBLIC AFFAIRS UNIVERSITY OF WISCONSIN-MADISON, ADDRESSING INCOME VOLATILITY OF LOW-INCOME POPULATIONS 9 (2015), <http://www.lafollette.wisc.edu/images/publications/workshops/2015-income.pdf>.

²⁴ SYLVIA ALLEGRETTO & DAVID COOPER, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE: WHY IT'S TIME TO GIVE TIPPED WORKERS THE REGULAR MINIMUM WAGE 19 (2014), <https://www.epi.org/files/2014/EPI-CWED-BP379.pdf>; VIRGINIA ANDERSON ET AL., ROBERT M. LA FOLLETTE SCHOOL OF PUBLIC AFFAIRS UNIVERSITY OF WISCONSIN-MADISON, ADDRESSING INCOME VOLATILITY OF LOW-INCOME POPULATIONS 9 (2015), <http://www.lafollette.wisc.edu/images/publications/workshops/2015-income.pdf>.

²⁵ RESTAURANT OPPORTUNITIES CENTERS UNITED, THE THIRD SHIFT CHILDCARE NEED AND ACCESS FOR WORKING MOTHERS IN RESTAURANTS 16 (2013), <https://www.thenation.com/wp-content/uploads/2015/04/ChildCare-Report-Final.pdf>; RESTAURANT OPPORTUNITIES CENTERS UNITED & NATIONAL WOMEN'S LAW CENTER, NIGHTCARE: THE GROWING CHALLENGE FOR PARENTS ON THE LATE SHIFT 2 (2016), http://rocunited.org/wp2015b/wp-content/uploads/2016/09/Nightcare_Report_W.pdf.

make decent tips, but sometimes you go home at the end of the night with \$10.”²⁶ A car wash worker conveyed a similar experience: “Twice a week, every week, they make us sign a piece of paper that says we make \$20 or \$25 each day in tips, but we don’t always make that much. Sometimes we only make \$5 or \$10 dollars a day, and on rainy days, we’re sent home and make no tips at all.”²⁷

For tipped workers, the inherent income volatility exacerbates the challenges already present in making ends meet on minimum wage. Tipped workers’ economic security is particularly precarious²⁸ because their pay varies week-to-week, and even day-to-day. Unpredictable and unstable income makes it difficult to effectively budget and pay bills.²⁹

The economic insecurity perpetuated by a subminimum wage for tipped workers disproportionately impacts workers of color, immigrants, and women, who are overrepresented among tipped workers. Workers of color comprise 40% of all tipped workers;³⁰ Latinos, Blacks, and Asians are over-represented.³¹ One study estimated that in 2016, 69% of hairstylists, 70% of barbers, and 69% of car wash workers—all tipped occupations—in New York City were foreign-born.³² Additionally, women are estimated to comprise two-thirds of tipped workers, and 37 percent of them are mothers;³³ half of tipped working mothers are single parents.³⁴ And a

²⁶ *New York State Wage Board Hearing*, October 2014 (testimony from Alexandra Sanjaun), available at https://labor.ny.gov/workerprotection/laborstandards/testimony/Alexandra_Sanjaun.pdf.

²⁷ WASH NEW YORK, CAR WASH INDUSTRY, available at <http://washnewyork.org/car-wash-industry/> (last checked June 27, 2018).

²⁸ Saru Jayaraman, *The Rock-Bottom Pay Mandated for Tipped Workers Like Servers in Restaurants Need to Rise from \$2,13 an Hour*, University of California Berkeley Labor Center, Sept. 22, 2013, available at <http://laborcenter.berkeley.edu/the-rock-bottom-pay-mandated-for-tipped-workers-like-servers-in-restaurants-needs-to-rise-from-2-13-an-hour/>.

²⁹ NATIONAL WOMEN’S LAW CENTER, COLLATERAL DAMAGE: SCHEDULING CHALLENGES FOR WORKERS IN LOW-WAGE JOBS AND THEIR CONSEQUENCES 4 (2017), <https://nwlc.org/wp-content/uploads/2017/04/Collateral-Damage.pdf>.

³⁰ RESTAURANT OPPORTUNITIES CENTERS UNITED ET AL., REALIZING THE DREAM: HOW THE MINIMUM WAGE IMPACTS RACIAL EQUITY IN THE RESTAURANT INDUSTRY AND IN AMERICA 2 (2013), http://rocunited.org/wp-content/uploads/2014/02/report_realizing-the-dream.pdf.

³¹ RESTAURANT OPPORTUNITIES CENTERS UNITED, RECIPE FOR SUCCESS: ABOLISH THE SUBMINIMUM WAGE TO STRENGTHEN THE RESTAURANT INDUSTRY 2, http://rocunited.org/wp-content/uploads/2014/03/ROCUnited_Recipe-for-Success.pdf.

³² CHRISTIAN GONZÁLEZ-RIVERA, CENTER FOR AN URBAN FUTURE, WHERE IMMIGRANT NEW YORKERS GO TO WORK (2016), <https://nycfuture.org/data/immigrant-workers-data-brief>.

³³ RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE, 3 (2018), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

³⁴ RESTAURANT OPPORTUNITIES CENTERS UNITED, RECIPE FOR SUCCESS: ABOLISH THE SUBMINIMUM WAGE TO STRENGTHEN THE RESTAURANT INDUSTRY 2, http://rocunited.org/wp-content/uploads/2014/03/ROCUnited_Recipe-for-Success.pdf.

third of tipped workers are parents.³⁵ For all parents, accessing desirable shifts that yield higher tips—and larger paychecks, such as shifts on nights and weekends in the restaurant industry—is even more difficult due to a lack of affordable childcare.³⁶

It is not surprising that, as the minimum wage increases, the number of workers living in poverty significantly declines.³⁷ In jurisdictions where there is one minimum wage, tipped workers earn more money; studies show customers tip the same regardless of whether the workers earn a minimum or subminimum wage.³⁸ Because of their disproportionate representation in tipped occupations, it is reasonable to expect that workers of color stand to benefit the most from eliminating the subminimum wage. The organization Restaurant Opportunities Centers United projects that almost half of tipped workers lifted out of poverty by increasing the tipped minimum wage would be workers of color.³⁹ And one wage across all occupations will especially benefit women, parents, and single mothers.

A subminimum wage institutionalizes unequal pay for workers based on race and gender by forcing them to rely on tips from customers

While tipping should always be permitted for customers who wish to express their satisfaction with workers' good service, relying on it as a means for an employer to meet minimum labor standards is problematic because of disparities in tips paid to tipped workers based on race and gender. In an observational study of how the race of servers impacted the amount they were tipped by diners, researchers found that consumers discriminated against black servers by tipping them less than white servers.⁴⁰ Further, among all races of workers in tipped industries,

³⁵ RESTAURANT OPPORTUNITIES CENTERS UNITED, RECIPE FOR SUCCESS: ABOLISH THE SUBMINIMUM WAGE TO STRENGTHEN THE RESTAURANT INDUSTRY 2, http://rocunited.org/wp-content/uploads/2014/03/ROCUnted_Recipe-for-Success.pdf.

³⁶ RESTAURANT OPPORTUNITIES CENTER UNITED, THE THIRD SHIFT CHILDCARE NEED AND ACCESS FOR WORKING MOTHERS IN RESTAURANTS 16 (2013), <https://www.thenation.com/wp-content/uploads/2015/04/ChildCare-Report-Final.pdf>.

³⁷ RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE, 6-7 (2018), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

³⁸ RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE, 6 (2018), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

³⁹ RESTAURANT OPPORTUNITIES CENTERS UNITED ET AL., REALIZING THE DREAM: HOW THE MINIMUM WAGE IMPACTS RACIAL EQUITY IN THE RESTAURANT INDUSTRY AND IN AMERICA 2 (2013), http://rocunited.org/wp-content/uploads/2014/02/report_realizing-the-dream.pdf.

⁴⁰ Michael Lynn et al., *Consumer racial discrimination in tipping: A Replication and Extension* [Electronic version] (2008). Retrieved June 11, 2018 from Cornell University School of Hotel Administration, <http://scholarship.sha.cornell.edu/articles/27>.

Black and Hispanic workers received the lowest median hourly wage, even when tips are included.⁴¹

Research has also found that the amount that women are tipped is based on whether they meet societal expectations of physical attractiveness, while physical attractiveness does not play a role in the amount of tips men receive. One study showed that women who successfully conformed to societal expectations of attractiveness and femininity were tipped more than women who did not.⁴² For example, studies have found that women who are slender⁴³ and wear make-up⁴⁴ receive greater tips. And, among women tipped workers in certain occupations, opportunities to receive larger tips are often denied to women of color.⁴⁵

Especially for the two-thirds of tipped workers who are women,⁴⁶ but for workers of all genders, a subminimum wage exacerbates their vulnerability to sexual harassment. The livelihood of tipped workers depends on interactions with customers, requiring them to ask, “How much money will I make, and how much will I tolerate to make it?”⁴⁷ Sixty percent of transgender, 50% of women, and 47% of restaurant workers surveyed in one study reported experiencing “scary” or “unwanted” sexual behavior at work.⁴⁸ Workers in subminimum wage jurisdictions are more

⁴¹ SYLVIA ALLEGRETTO & DAVID COOPER, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE: WHY IT’S TIME TO GIVE TIPPED WORKERS THE REGULAR MINIMUM WAGE 12 (2014), <https://www.epi.org/files/2014/EPI-CWED-BP379.pdf>.

⁴² Michael Lynn & Tony Simons, *Predictors of male and female servers' average tip earnings* [Electronic Version], 9 (2000). Retrieved June 11, 2018 from Cornell University School of Hotel Administration, <https://scholarship.sha.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1159&context=articles>.

⁴³ Catrin Einhorn & Rachel Abrams, *The Tipping Equation*, New York Times, March 12, 2018, available at <https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html> (last checked June 1, 2018).

⁴⁴ Celine Jacob et al., *Waitresses' facial cosmetics and tipping: A field experiment*, 29 [INT’L J. HOSPITALITY MGMT 188 \(2010\)](#).

⁴⁵ Kari Paul, *Do American Tip People of Color Less Money?* Market Watch, October 31, 2017, available at <https://www.marketwatch.com/STORY/DO-AMERICANS-TIP-PEOPLE-OF-COLOR-LESS-MONEY-2017-10-31> (last checked June 11, 2018).

⁴⁶ RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE 5 (2018), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf (women experience sexual harassment at higher rates than men).

⁴⁷ Catrin Einhorn & Rachel Abrams, *The Tipping Equation*, New York Times, March 12, 2018, available at <https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html> (last checked June 1, 2018). The *Times* followed up this story with a piece consisting of readers’ reactions, in which they recounted their own experiences as restaurant servers. See Catrin Einhorn and Zach Wichter, *Harassment and Tipping in Restaurants: Your Stories*, New York Times, March 18, 2018, available at <https://www.nytimes.com/2018/03/18/business/restaurant-harassment-tipping.html> (last checked June 1, 2018).

⁴⁸ RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE, 4 (2018), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

likely to experience sexual harassment than workers who earn the minimum wage.⁴⁹ And, because they fear losing their jobs, many workers do not report sexual harassment.⁵⁰ Despite underreporting, the largest share of sexual harassment charges filed with the Equal Employment Opportunity Commission came from the restaurant industry,⁵¹ where a large portion of workers are tipped workers.

Eliminating the subminimum wage cannot, on its own, remedy pay inequity or sexual harassment, but it would begin to dismantle a two-tiered wage system that is drawn along race and gender lines and the entrenchment through law of disparate wages for tipped and non-tipped workers. It would also help reduce the impact of the economic vulnerability that prevents workers from standing up to abuse and challenging the normalization of sexual harassment in these workplaces.

A subminimum wage facilitates wage theft by employers, in turn exacerbating economic insecurity for workers who are not paid even the minimum wage

Tipped workers are also more vulnerable to wage theft by their employers than their counterparts who are paid the minimum wage because of their different treatment under the law.⁵² Among low-wage workers surveyed in a 2008 study in New York City, 37% of tipped workers were at risk of experiencing a minimum wage violation, compared to only 21% of all low-wage workers.⁵³ Further, 7% of tipped workers in New York City were at risk of having their tips stolen by their employers.⁵⁴ Tips are susceptible to being stolen because of how they are collected: whether left in a jar, on a table, or via credit card, employers can easily collect and then simply not distribute tips intended for workers, without workers even knowing the full amount of the tips. For example, a 2012 New York State Attorney General investigation into 21 car washes revealed that car wash managers improperly took shares of workers' cash tips—left

⁴⁹ RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE, 5 (2018), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

⁵⁰ THE RESTAURANT OPPORTUNITIES CENTERS UNITED ET AL., THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 1 (2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf.

⁵¹ *Id.*

⁵² ECONOMIC POLICY INSTITUTE, EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECK EACH YEAR 7 (2017), <https://www.epi.org/files/pdf/125116.pdf>.

⁵³ ANNETTE BERNHARDT ET AL., NATIONAL EMPLOYMENT LAW CENTER, WORKING WITHOUT LAWS: A SURVEY OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 19, Table 3.1 (2010), <http://www.nelp.org/content/uploads/2015/03/WorkingWithoutLawsNYC.pdf>.

⁵⁴ ANNETTE BERNHARDT ET AL., NATIONAL EMPLOYMENT LAW CENTER, WORKING WITHOUT LAWS: A SURVEY OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 21 (2010), <http://www.nelp.org/content/uploads/2015/03/WorkingWithoutLawsNYC.pdf>.

in tip jars by customers—for themselves.⁵⁵ In addition, the prominent New York City restaurant Blue Hill settled a 2016 class action wage theft lawsuit brought by workers who alleged, among other claims, that managers took workers' tips and unlawfully shared them with restaurant workers who do not qualify as tipped workers, and failed to distribute to workers any of the tips collected from customers as automatic service charges.⁵⁶

Moreover, some employers, unlawfully, do not pay their workers even the subminimum wage, forcing workers to rely almost entirely on tips. Several servers at one restaurant testified that they were paid thirty dollars per day for working between eight and thirteen hours per day, less than four dollars per hour, plus tips.⁵⁷ In one study that interviewed 89 car wash workers, only five workers reported that they were paid the difference to make up the minimum wage if their tips were less than the legal rate.⁵⁸ And other employers pay the subminimum wage to workers who do not meet the definition of a "tipped worker." Recent settlements of lawsuits and investigations against various Domino's franchisees showed that some franchisee owners improperly paid the subminimum wage rate to workers during shifts (or portions of shifts) when those workers performed un-tipped work (e.g., cooking and cleaning) and thereby earned no tips at all.⁵⁹

Violations of labor laws are more harshly felt by non-white, foreign born,⁶⁰ and women tipped workers⁶¹ than white and U.S.-born tipped workers, further contributing to their diminished pay

⁵⁵ Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Nearly \$4m Settlement With Two NYC Car Wash Chains For Underpaying Workers And Other Violations (March 6, 2014), available at <https://ag.ny.gov/press-release/ag-schneiderman-announces-nearly-4m-settlement-two-nyc-car-wash-chains-underpaying>.

⁵⁶ *Leah Jacobs et al. v. Washington Place, LLC et al.*, New York State Supreme Court, Kings County, Index No. 503148/2017.

⁵⁷ *Matter of Moina et al.*, PR 10-069 [July 25, 2013], <http://industrialappeals.ny.gov/decisions/pdf/pr-10-069.pdf>.

⁵⁸ WASH NEW YORK, CAR WASH INDUSTRY, available at <http://washnewyork.org/car-wash-industry/> (last checked June 27, 2018).

⁵⁹ Steven Greenhouse, *Domino's Delivery Workers Settle Suit for \$1.3 Million*, N.Y. Times, Jan. 31, 2014, available at <https://www.nytimes.com/2014/02/01/nyregion/dominos-franchise-settles-delivery-workers-lawsuit-for-1-28-million.html> (last checked June 1, 2018); Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Settlements Totaling \$480K With 10 Domino's Franchise Locations For Violating Workers' Basic Rights (March 9, 2017), available at <https://ag.ny.gov/press-release/ag-schneiderman-announces-settlements-totaling-480k-10-dominos-franchise-locations>; Press Release, New York State Office of the Attorney General, A.G. Schneiderman Announces Settlements With Five Domino's Pizza Franchisees For Violating Workers' Basic Rights In Stores Statewide (April 14, 2015), available at <https://ag.ny.gov/press-release/ag-schneiderman-announces-settlements-five-domino%E2%80%99s-pizza-franchisees-violating>.

⁶⁰ CENTER FOR AN URBAN FUTURE AND THE CENTERS FOR POPULAR DEMOCRACY, A CITY OF IMMIGRANT WORKERS 23 (2016), <https://nycfuture.org/pdf/A-City-of-Immigrants.pdf>.

and, in turn, their economic insecurity. And many of these violations go unreported because workers risk being fired or otherwise retaliated against if they complain, whether to their employer or an enforcement agency. In tipped occupations that have high concentrations of immigrant workers (particularly undocumented workers) such as car washers, employers threaten workers with deportation if they report instances of wage theft and abuse.⁶² This threat of retaliation is also common in tipped occupations predominantly comprised of immigrant women, like nail salons. Many of these workers often keep silent because of fear of retaliation from their employers.⁶³

One minimum wage will help ensure that, even if employers continue to steal tips from workers, workers are at least earning a predictable wage that meets minimum wage standards regardless of occupation, industry, or employer. It will also ensure that enforcement against unscrupulous employers who steal tips becomes easier. As discussed further below, recordkeeping obligations for employers will be less burdensome. This means that enforcement agencies conducting reviews of records will be able to avoid much of the complex analysis needed to determine compliance with use of the tip credit. Streamlined enforcement facilitated by bright-line standards is always preferable for ensuring that workers' rights are protected. The need for effective, efficient wage and hour enforcement by government enforcement agencies has become even more pronounced in the wake of the recent Supreme Court decision, *Epic Systems Corp. v. Lewis*, 584 U.S. ____ (2018), which threatens to severely limit workers' ability to recover stolen wages, placing added pressure on such agencies to examine entire workplaces due to workers' decreased ability to collectively sue employers.

One minimum wage is good for business

One minimum wage will facilitate economic security for tipped workers, help combat pay disparities along race and gender lines among tipped workers, and alleviate some of the barriers to combatting sexual harassment. One minimum wage will also benefit employers. Compliance

⁶¹ ANNETTE BERNHARDT ET AL., NATIONAL EMPLOYMENT LAW PROJECT, WORKING WITHOUT LAWS: A SURVEY OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 5 (2010), <http://www.nelp.org/content/uploads/2015/03/WorkingWithoutLawsNYC.pdf>.

⁶² CENTER FOR POPULAR DEMOCRACY, BY A THOUSAND CUTS: THE COMPLEX FACE OF WAGE THEFT IN NEW YORK 4 (2015)

<file:///I:/Legal/Policy/Public%20Comments%20by%20OLPS/DOL%20Tip%20Credit/Cited%20Material/By%20A%20Thousand%20Cuts%20CPD.pdf>.

⁶³ Kim Barker & Russ Buettner, *Nail Salon Sweeps in New York Reveal Abuses and Regulatory Challenges*, New York Times, Feb. 29, 2016, available at <https://www.nytimes.com/2016/03/01/nyregion/nail-salon-sweeps-in-new-york-reveal-abuses-and-regulatory-challenges.html> (last checked June 1, 2018).

with wage and hour laws will be far simpler. And research suggests that, contrary to employers' fears, one minimum wage does not hurt profits and might even be good for business.

OLPS frequently addresses concerns raised by employers about administrative burdens related to complying with labor laws. Compliance with the current two-tiered wage system requires employers to determine whether workers who perform multiple roles within the business should be treated as tipped workers in the first instance and then ensure that workers are making the minimum wage if they are properly categorized as a tipped worker. This requires time-consuming calculations on a daily basis to verify exactly how much in tips workers are receiving, and whether the amount meets or exceeds the range required by the tip credit rules.

Paying workers one minimum wage, and making sure that workers receive the tips that are paid directly to them or collected elsewhere and subsequently distributed to them, alleviates much of the practical burden just described. And, to the extent that adjusting to a new system might be a challenge, OLPS knows, based on its enforcement of municipal labor laws including the Earned Safe and Sick Time Act (ESSTA), that these concerns are often offset by positive benefits that accrue to the workplace. With elimination of the tipped wage, for example, it would be reasonable to expect the same for business here, given the lessened recordkeeping demand. In the case of ESSTA, employers have reported that compliance with the law has had a neutral to positive effect on business.⁶⁴

Elimination of the subminimum wage rate might also improve profits and worker retention. In 2014, the Economic Policy Institute found that the seven states where tipped workers are paid the regular minimum wage experienced rates of higher employment growth in leisure and hospitality industries than in states that pay tipped workers below the minimum wage.⁶⁵ This is consistent with the National Restaurant Association's recent projection that employment in the restaurant industry would grow by 6.1% in New York State.⁶⁶ And research suggests that there

⁶⁴ EILEEN APPELBAUM & RUTH MILKMAN, NO BIG DEAL: THE IMPACT OF NEW YORK CITY'S PAID SICK DAYS LAW ON EMPLOYERS (2016), <http://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf>. See also NEW YORK CITY, OFFICE OF THE MAYOR, TWO YEARS AFTER MAYOR DE BLASIO EXPANDS PAID SICK LEAVE TO ONE MILLION NEW YORKERS, CITY'S ECONOMY STRONGER THAN EVER, April 1, 2016, available at <http://www1.nyc.gov/office-of-the-mayor/news/318-16/two-years-after-mayor-de-blasio-expands-paid-sick-leave-one-million-new-yorkers-city-s-economy>.

⁶⁵ SYLVIA ALLEGRETTO & DAVID COOPER, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE: WHY IT'S TIME TO GIVE TIPPED WORKERS THE REGULAR MINIMUM WAGE 4, 18 (2014), <https://www.epi.org/files/2014/EPI-CWED-BP379.pdf>.

⁶⁶ New York Times Editorial Board, Wage Theft in Restaurants, *New York Times* (March 12, 2018), <https://www.nytimes.com/2018/03/12/opinion/tipping-restaurants-servers-cuomo-new-york.html>. The op-ed references a 2015 study by two Cornell University professors that found little evidence for the notion that raising the

is no difference between sales in jurisdictions where there is no subminimum wage and those where there is one minimum wage.⁶⁷ Businesses are able to recoup costs of increased minimum wages from increased sale prices without losing business perhaps in part because a sizable majority of customers (71%) agree with minimum wage increases even if such increases mean higher prices for meals.⁶⁸

A subminimum wage for tipped workers is rife with problems for workers, from contributing to economic insecurity to perpetuating and worsening wage disparities along race and gender lines. Eliminating the subminimum wage would be good for workers and for business. OLPS urges the elimination of the subminimum wage rate for tipped workers, and strongly supports the NYSDOL's Proposal.

Respectfully submitted,



Lorelei Salas
Commissioner
New York City Department of Consumer Affairs

minimum wage hurts the restaurant industry, the summary of which is available here:
<https://scholarship.sha.cornell.edu/chrreports/2/>.

⁶⁷ RESTAURANT OPPORTUNITIES CENTERS UNITED, BETTER WAGES BETTER TIPS: RESTAURANTS FLOURISH WITH ONE FAIR WAGE, 9 (2018), http://rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.

⁶⁸ Lisa Graves & Zaid Jilani, The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them, *The Intercept*, April 17, 2018, available at <https://theintercept.com/2018/04/17/the-restaurant-industry-ran-a-private-poll-on-the-minimum-wage-it-did-not-go-well-for-them/>.